

1 UNITED STATES OF AMERICA )  
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 3 Plaintiff-Appellee, )  
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 5 v. )  
 6 KEVIN LEE DAVIS, )  
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 8 Defendant-Appellant.)  
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**\*E-FILED - 8/1/12\***

No. C-05-03756-DLJ  
 CR-98-40082-DLJ  
 (Appeal No. 12-16575)  
**ORDER**

Kevin Davis (Davis) was the leader of a large-scale cocaine trafficking organization that operated in Oakland in 1997 and 1998. In January 2001 Kevin Davis and one of his co-defendants, Lionel McCoy went to trial. During the trial, Sandy Medina, a former co-defendant who had already plead guilty, was called as a witness. She asserted her Fifth Amendment privilege and refused to testify. Given her unavailability as a witness, her statement was redacted to eliminate her observations of the criminal conduct of others, and the remaining portion, in which she confessed to her own criminal conduct, was read to the jury.

The jury found Davis guilty of 79 of the counts charged against him. Davis appealed his convictions. In his appeal, among other issues, Davis alleged that the admission of Medina's statement was in error. The Ninth Circuit found no prejudicial error and in January 2004 the Ninth Circuit affirmed the convictions in United States v. McCoy, 90 Fed. Appx 201 (9th Cir. 2004).

Davis next filed a motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255. Davis again challenged the admission of Medina's statements as a

1 Confrontation Clause violation. This Court denied Davis's  
2 motion and Davis appealed.

3 The Supreme Court's decision in Crawford v. Washington,  
4 541 U.S. 36 (2004) was issued after Davis's trial and the McCoy  
5 decision had been filed, but before his conviction had become  
6 final. The Ninth Circuit's latest ruling dated January 14,  
7 2011 held that Crawford applied to Davis' case. Because the  
8 United States conceded on appeal that the admission of Medina's  
9 statement violated Davis' Confrontation Clause rights under  
10 Crawford, the Ninth Circuit remanded the matter to this Court  
11 to determine if the error was prejudicial. United States v.  
12 Davis, 408 Fed. Appx. 124 (9th Cir. 2011).

13 On May 21, 2012 this court issued an order finding that  
14 there was no prejudicial error in the admission of Medina's  
15 statement. On or about July 8, 2012 defendant filed an appeal  
16 of that order with the Ninth Circuit. On July 18, 2012 that  
17 Ninth Circuit issued an order staying the briefing in the  
18 appeal pending this Court issuing a Certificate of  
19 Appealability.

20 Defendant has raised a constitutional issue as to whether  
21 admission of the Medina statement was prejudicial error and is  
22 thus appealable and a certificate of appealability should  
23 issue. See United States v. Asrar, 116 F.3d 1268, 1270 (9th  
24 Cir. 1997).

25 IT IS SO ORDERED.

26 Dated: July 31, 2012



27 D. Lowell Jensen  
28 United States District Judge

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Copy of Order E-Filed to Counsel of Record:

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